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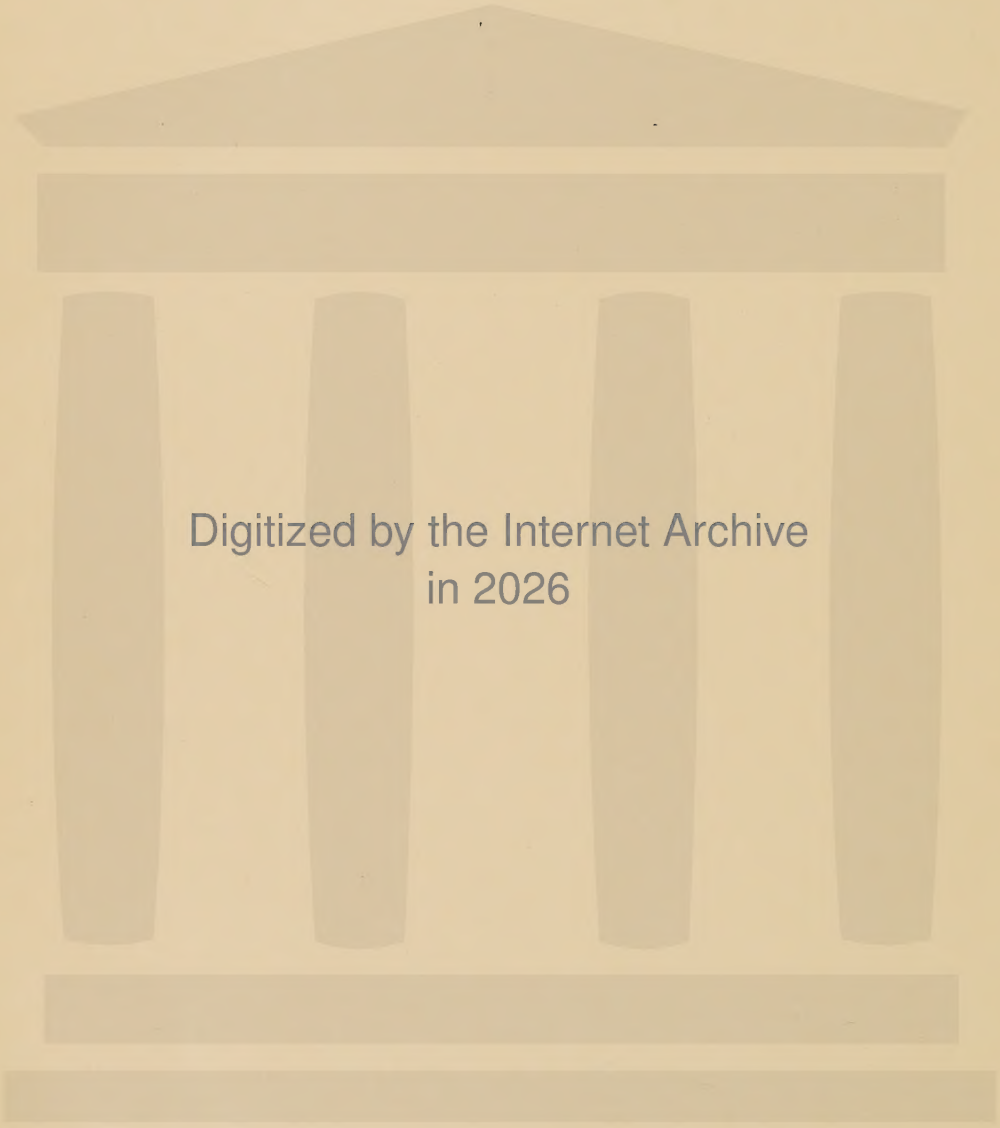

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FOREWORD

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RECENT DECISIONS

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NUISANCE, NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE

Delaney v. Philhern Realty Holding Corp., 280 N.Y.461

The case of Delaney v. Philhern Realty Holding Corp. (280 N.Y.461) afforded whatever inspiration this article possesses. In his separate opinion in which he concurs in result, Chief Judge Crane of the Court of Appeals states, "There has been so much written and said about the defense of negligence in an action of nuisance that the subject has become a mystery, smothered in verbiage." This is little encouragement indeed for our venturing to discuss this already obscure subject. However, the quality of mystery in the law is one too frequently encountered (by the writer) to be of grave concern.

The misfortune that dogs the steps of the pedestrian, contrived through the alleged negligence of the defendant to cause injury to the plaintiff and bring about the suit of Delaney v. Philhern Realty Corp. The defendant contractor had run a pipe for the passage of compressed air across a sidewalk. The pipe was flanked by thick boards with beveled edges. One of these boards became tilted against the pipe in such a way that the plaintiff's attempt to step across was a disastrous failure. A permit was required for the obstruction to the public walk by the defendant, and a permit was obtained; but whether its wording covered a crossing by-way of pipes was, the court held, properly submitted to the jury. The case was sent back for a new trial because the following instruction to the jury was found deficient. From the point of view of the claim that it was a nuisance, any obstruction like this which was allowed to become loose or otherwise, so that it did tilt up and become a subject of danger to a pedestrian, constituted a nuisance, and then the question of contributory negligence would not enter as it does on the theory of negligence only. The Court of Appeals explained, "If no license has been issued, then an obstruction in the public way is an absolute nuisance; whereas, if a permit has been issued but the privilege to obstruct the public way is exercised in an improper manner, then the resulting nuisance is a kind which arises out of negligence." This case, then, was one in which the jury should have been charged that the tilting of the board was a claim of nuisance to which contributory negligence would be an adequate defense. Chief Judge Crane found it necessary to write a separate opinion to express the view that "in all except rare cases of absolute nuisance of extreme danger, contributory negligence may be a defense."

To briefly state the legal principles involved in this, and in the cases cited hereafter, an absolute nuisance or nuisance per se, is a nuisance based on an act which is unlawful even if performed with due care. To this class of nuisance, mere want of ordinary care on the part of the plaintiff is not a sufficient defense. It must be shown that the plaintiff, being informed of the danger, determined to take the risk, on the principle of "Volenti non fit injuria." (Delaney v. Philhern, citing Muller v.

McKesson, 73 N.Y. 195, Lynch v. McNally, 73 N.Y. 347, McFarlane v. City of Niagara Falls, 247 N. Y. 340).

To the other class of nuisance, nuisance arising out of negligence, want of ordinary care is a defense. (Delaney v. Phlhern, McFarlane (supra), and many others). At the outset, it is apparent that the term "nuisance" as applied to this second class is one aiding the confusion. Negligence is the basis of the allegation as the elements necessary are lack of ordinary care by the defendant resulting in injury to the plaintiff, who has exercised ordinary care. Therefore, negligence should be the term applied to the theory of the action. Judge Cardozo in the McFarlane v. City of Niagara Falls (supra) case comments on this point in this view. "Not a little confusion runs through the reports as to the effect of contributory negligence upon liability for nuisance. Statements appropriate enough in their application to nuisances of one class have been thoughtlessly transferred to nuisances of another. There has been forgetfulness at times that the forms of actions have been abolished, and the liability is dependent upon the facts and not upon the name. Confining ourselves now to the necessities of the case before us, we hold that whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance."

In McFarlane v. City of Niagara Falls (supra) the plaintiff stumbled in stepping from driveway to walk on a "fan-like projection where the cement had melted and run", jutting out from the sidewalk about sixteen inches. The case was tried on the theory of nuisance, but was held by the court to be a nuisance arising from negligence, and therefore one in which contributory negligence was a defense. Once the court comes to the conclusion that the nuisance is one growing out of negligence, the rule that contributory negligence shall be a defense is consistently applied, as a review of cases hereunder will show. But when the case is one of absolute nuisance or nuisance per se, as sometimes termed, there is some conflict in the cases. (See infra.)

Most nuisance cases arise from obstruction to the public highway. If not authorized by public authority, the defendant is guilty of nuisance per se, in which case this care is immaterial. If the defendant acts under license or permit, his liability arises from his negligent maintenance of the obstruction. (See cases infra

In McGuire v. Spence (91 N.Y.303) the plaintiff, engaged in a game of jump-rope one afternoon, fell into an uncovered area in the sidewalk. Nothing was said as to permit or license for the opening But the court said, "Even if the burden rested upon her of showing that her own fault did not contribute to the injury, which we do not hold, but which the trial judge seems to have charged, she bore that burden successfully." It was pointed out that negligence meant lack of reasonable care under the circumstances, and obstructions to the public sidewalk need not be anticipated. In effect the case implied that because of the presumption of safety to a traveler using a public highway and the dangerous condition caused by the defendant, the degree of care imposed on the plaintiff was

comparatively light. The case has been cited often with approval and is in line with the accepted rule. The plaintiff in Kelly v. Doody, 116 N.Y.575, toppled into a trench dug by the defendant in the street with permission of the municipal authorities. The plaintiff was aware of the excavation, as he lived nearby, but the Trial Court charged that his contributory negligence was not an issue. This was held error, on appeal, because the obstruction was authorized, and therefore not wrongful in its very nature; but liability was predicated only upon negligence in the use of the privilege. This case is typical.

The defendant contractor in Nolan v. King, 97 N.Y. 565, in constructing a vault beneath the sidewalk built a wooden bridge over the opening. The case was tried upon allegations of lack of care in the construction of the bridge, which was expressly permitted by the authorities. A charge that the bridge "must be so constructed that the plaintiff be not subjected to any more risk than if the sidewalk had been there' was held error on appeal; the court stating the correct charge have been "it merely must be safe and free from peril to persons crossing with such ordinary prudence and care as the presence of the temporary structure requires."

Clifford v. Dam, 81 N.Y.52, is a leading and much quoted case on the subject. There a disc, covering a coal hole in the sidewalk flew off when stepped on by the plaintiff, with painful results. The court held that failure to plead any permit or license for the opening barred any proof thereof, the case thus becoming one of absolute nuisance, in which contributory negligence was no defense. An elaborate discussion of contributory negligence was therefore dictum. Clifford v. Dam was directly in line with the holding in Irvine v. Wood, 51 N.Y.224, a much similar case in which the injury was caused by a coal hole constructed without a permit, thus making the defendant liable irrespective of any question of negligence on his part in maintaining it.

The language of Jennings v. Van Schaick, 108 N.Y.530 is doubtful. There, permission of the municipal authorities to construct a coal-vault was inferred from long use and acquiescence, "and so the structure was not, in and of itself, a nuisance. But the consent of the city is conditioned upon certain modes of use, and if the opening is left unguarded it becomes at once a trap and a nuisance - and so the act is a positive wrong on the part of the person having it open...." However, since the court earlier in the opinion discussed the plaintiff's conduct, in saying she had a right to assume the safety of the sidewalk until warned of danger, we may infer that the nuisance referred to was not a so-called absolute nuisance, in which case plaintiff's conduct would have been of no moment.

From a reading of the digest it would seem that the coal hole has been a formidable menace to the public health; albeit a bountiful source of revenue to the legal profession, for it has been involved in innumerable cases, not all however, discussing the question of the plaintiff's contributory negligence as a defense to a claim of nuisance.

Junkerman v. Tilyon, 213 N.Y.404, in which a boardwalk leased by defendant collapsed during a baby parade, injuring the plaintiff

is an example of a line of cases involving landlord and tenant in which the action has been brought in the form of nuisance or negligence, indifferently. This is on the principle that an improperly constructed, or out-of-repair building where a menace to the public is a nuisance, but liability does not arise unless the dangerous condition is known. But the contributory negligence of the plaintiff is not discussed here.

Another case exemplifying a cause of action in the dual form is that of Hogle v. Franklin Mfg. Co., 199 N.Y. 388. The plaintiff was injured by a piece of iron allegedly maliciously thrown from a window of the defendant's factory. The evidence supported a finding that throwing missiles from the defendant's windows had been the practice for more than a year, with the defendant's knowledge, though without its consent and in violation of its orders. The court held that a judgment for plaintiff might be sustained on the ground either of negligence or of nuisance. Negligence was found in the defendant's failure to take reasonable means to suppress a dangerous practice of which he had notice. Judge Vann, however, "personally of the opinion that the practice complained of was a nuisance as a matter of fact, if the jury so found." The practice was a constant repetition of trespasses, and "when direct, substantial and well-known, I think the duty of the defendant became absolute and that it was guilty of suffering a nuisance to continue."

The case is important as an illustration of striking application of the rule distinguishing between absolute nuisance and negligence. Not always is the distinction so clear cut as in the cases where the determining factor is the authority or want of authority for obstructing public highways. In Hogle v. Franklin Mfg. Co. (supra) it was the continuance of the dangerous acts which raised them to the nature of absolute nuisance which would obviate the necessity of the plaintiff's proving defendant's lack of reasonable diligence in suppressing these acts if the jury should find the facts.

In Wilks v. N.Y.Telephone Co., 243 N.Y.351, plaintiff's husband was electrocuted upon coming into contact with a fallen telephone wire. Evidence was introduced to show that the wires were improperly installed, as the span between poles was too great, the wires too small and weak, the insulation defective, and the proximit of high-power wires made it possible that these loosely swaying wires come into contact with power wires. The case was submitted, on the theory that the stringing of these loose wires near the high-power wires was a nuisance; yet the trial court charged that there could be no recovery if the negligence of decedent contributed to his death. The court found this charge in conflict with the established doctrine that if the wires were a nuisance, then the negligence of deceased was not an issue. Evidently, therefore, it regarded the nuisance as absolute. While another point in the case, declared reversible error, undoubtedly prevented much discussion of the distinction between nuisance per se and nuisance arising from negligence, it is apparent that the dangerous condition which was labeled nuisance, arose from the faulty and careless construction of the wires in the first place. Applying the rules stated previously, this would seem at first to be a nuisance arising from negligence. However, by comparison with the Hogle case, the label of nuisance per se may be justified on the ground that this was the

continuance of a highly dangerous condition, but at best the Wilks case is questionable.

There are of course, many cases of condition dangerous and burdensome to the public, or to private property owners, which have been unhesitatingly and correctly termed absolute nuisances. In most of these the court has correctly stated the rule that liability was independent of defendant's negligence and the contributory negligence of the plaintiff.

It was held in Heeg v. Licht, 80 N.Y.579, that the jury might find that, under the circumstances, the maintenance by the defendant of a powder magazine nearby other buildings constituted a nuisance. The trial judge committed reversible error in charging that the jury "must find for the defendant unless the defendant carelessly and negligently kept the gunpowder on his premises", and in refusing to charge that the powder magazine might be found to be dangerous of itself, in view of an explosion such as the one injuring the plaintiff, and therefore the defendant would be liable whether careless or not.

The factory of the defendant in McCarty v. National Carbonic Gas Co., 189 N.Y.40, continually emitted such noxious fumes that the jury might find him liable on the theory of nuisance despite the fact that he had taken all precautions.

Similarly, in Bohan v. Port Jervis Gaslight Co., 45 Hun 257, the use of naphtha by the defendant caused noxious odors. The court said "where damage is a necessary consequence of just what the defendant is doing or is incident to the business itself, the law of negligence has no application and the law of nuisance applies." This was a nuisance per se.

An engine house may be situated and used in such manner as to constitute a nuisance, to which no claim of due care by the defendant will be an answer. (Cogswell v. N.Y.& N.H.R.R., 103 N.Y.10).

The rule was followed in the case of Albee v. Chappaqua Shoe Mfg. Co., 62 Hun 223, 16 N.Y.Supp. 687). There the plaintiff's horses were frightened by defendant's "seven-mile" whistle. The action was tried on the theory that such a whistle was inherently dangerous, the court stating that the liability of the defendant rests on the wrong done, not the negligent manner of doing, and the negligence of the injured person is of no importance.

It is a public nuisance to keep a dog known to be vicious. (Muller v. McKesson, 73 N.Y.195). The plaintiff in that case had a savage Siberian bloodhound. In such a case the presumption of negligence on the defendant's part is unrebuttable, and a defense must show the injured person voluntarily brought brought the calamity upon himself. No doubts that the statement of the rule was correct, had arisen at the time of Lynch v. McNally, 73 N.Y. 347.

An additional feature of the nuisance question is ably discussed by Judge Vann in Welker v. City of New York, 190 N.Y.481. The plaintiff there complained of injuries sustained as a result of a fireworks display on a public street. In reviewing the cases of

Spur v. City of Brooklyn, 139 N.Y.6, and Landon v. City of New York, 180 N.Y. 48, the court questioned the statement in the Spur case that the discharge of fireworks in the streets of a city is a nuisance per se, because of the increasing frequency of such displays under proper supervision and with no injury resulting. The statement that "fireworks in certain streets may or may not be a nuisance, according to the circumstances which usually present a question of fact", was made in the Landon case. The circumstance in that case - exhibition on a large scale in the midst of a large city, before a vast multitude - were sufficient to justify a finding of nuisance However, these considerations led Judge Vann to remark that "Courts of high standing have held that a nuisance at law, or a nuisance per se exists only when the act done is a nuisance at all times and under all circumstances, regardless of location or surroundings. Each case must depend on its own facts for classification as a nuisance at law or in fact, or neither." It would seem then that, properly used, nuisance per se is by no means as broad a term as "absolute" nuisance, or nuisance independent of negligence; on the contrary, it applies to few cases indeed.

In conflict with the established rule that contributory negligence shall not be a defense in an action for absolute nuisance, is a line of cases including Dygert v. Schenck, 23 Wend. 446, Congreve v. Smith, 18 N.Y. 79, and Creed v. Hartmann, 29 N.Y. 591. In the first, the defendant dug a mill race across a public road, and bridged the mill race. When liability for an injury caused by the lack of repair of the bridge was pressed, the defendant's act was branded a nuisance by the court, in that it imperiled the safety of travelers. However, the court made the questionable statement, "The utmost care to prevent mischief will not protect him [defendant] if the injury happened without gross carelessness on the part of the sufferer. Congreve v. Smith makes the flat statement that persons who without authority, make excavations in public streets should be responsible for all injury thereupon, "there being no negligence by the parties injured", thus exaggerating the statement in the Dygert case. An excavation under the sidewalk was made without proper authority by the defendant in Creed v. Hartmann The opinion of Judge Ingraham stated it is only where the negligence [of the plaintiff] is clearly proved that the court is warranted in discussing the complaint. That the case was one in which the defendant was liable irrespective of his negligence was recognized by Judge Sheldon in his concurring opinion, but he cites with approval the statement from Congreve v. Smith, quoted above.

The error is traceable to the case of Butterfield v. Forrester (1809) 11 East 60, 103 Eng. Reprint 926, one of the earliest cases on the subject of contributory negligence. A pole had been placed across the highway, constituting a nuisance in the strictest sense. However, the plaintiff who was riding violently, ran into the pole and was injured. The court held his negligence was material. The trial judge instructed the jury that if a person could have seen and avoided the obstruction, and - that if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care - they should find for the defendant; and the jury did so find. The appellate court approved the instruction saying, "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this

action, an obstruction of the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." Judge Cardozo remarks in McFarlane v. City of Niagara Falls, 247 N.Y.340 (supra) "Very likely the breadth of [this] pronouncement calls for revision and restriction." Although the court may properly have been correct in determining the plaintiff's right to recover was barred by his fault, it should have placed its determination on the ground that the plaintiff's conduct was such as to amount to a heedless indifference to consequences, an assumption of risk, and not mere want of ordinary care. We have already seen the case of Muller v. McKesson, 73 N.Y. 195, 204, which stated that it could not be held that no act of the plaintiff, however negligent and wilful, bars his recovery. The defendant may show that the plaintiff brought the injury on himself.

The distinction between contributory negligence, i.e., want of ordinary care and assumption of risk, also called heedless indifference, appears to be one of degree. However, strictly speaking, acceptance of risk includes the element of notice of the danger. (McFarlene v. City of Niagara Falls, 247 N.Y.340, 349). It is often seen in the guise of "volenti non fit injuria" as in the cases of participation in the enterprises causing the injury. Thus a spectator who attended an automobile race held on a public highway, to witness and enjoy the contest - and not as a mere traveler or passer by - was precluded from recovery against the city although the grant of permission for such races was illegal. (Johnson v. City of New York, 186 N.Y.139, Bogart v. City of New York, 200 N.Y.379).

The doctrine of assumption of risk in its most technical application is found as an incident to the contractual relation of master and servant. More loosely applied, it is practically synonymous with the principle of "volenti non fit injuria", which is independent of contract. Its application in the latter sense is involved in Larson v. Nassau Electric Co.,223 N.Y.14, and Zurich G.A.& Liab. Ins. Co. v. Childs Co., 253 N.Y.324.

In the former a trolley car conductor was crushed between two cars when the air brakes failed because of a leak in the air chamber. However, there was evidence that the plaintiff may have been aware of the danger from the continual working of the automatic pump. The court held that this could not be held assumption of risk as a matter of law; rather, it was for the jury to decide whether the risk was so obvious or so imminent that he should have abandoned the car. He must have known, not only the defect, but the danger.

In the Zurich case, the defendant's sidewalk elevator, owing to a defect in the mechanism, often stopped a few feet below the walk. The plaintiff's assignor, a deliveryman, was accustomed to jump upon the platform and shake it violently to free it. On the day in question, the deliveryman slipped and fell on the rain-wet platform while trying to dislodge it. The impact caused the elevator to rise, severing one of his feet which protruded from the platform. Claims of assumption of risk and contributory negligence were both raised. The court pointed out that in the absence of any contractual relation between the parties, a finding of assumption of risk would be justified only if "the consequences were so obvious that as a reasonable man he must have had them in his mind, and had been ready with such knowledge to take the risk that he would suf-

fer them." The court adds that similar considerations negatived the argument that there was contributory negligence as a matter of law, in view of previous experiences, with safety. Thus it is apparent that the two claims were closely allied - in fact, scareely distinguishable.

It is at this point that we realize with full force the observation of Judge Crane, noted at the outset. His suggestion that save for a few cases of absolute nuisance of extreme danger, the negligence of the plaintiff contributing to the injury may be a bar to recovery; whether it should be, must be a question for the jury, and it is useless to attempt to define the degree of negligence which would thus be a defense. (Delaney v. Philhern etc., supra).

A similar sentiment was hinted at by Judge Cardozo in McFarlane v. City of Niagara Falls, 247 N.Y. 340, 350. He said, "When a case of absolute nuisance shall be here, there shall be need to determine whether contributory negligence in any sense is a factor to be weighed in determining liability. The factor is not eliminated by saying that to make out contributory negligence in situations of that order, the conduct, if attributed to a man of normal understanding, must betoken indifference to consequences, known or unknown. This may be merely to say in other words that there is a duty of reasonable vigilance in proportion to the risk. Very often, something close to indifference must appear although the basis of liability is nuisance growing out of negligence [citing McGuire v. Spence, supra]. There are times even when, as we have already pointed out, fault must approach a complete abandonment of caution to make out the absence of ordinary care." (It will be noted that absolute nuisance in the Delaney v. Philhern case would rest only on a determination by the jury that the wording of the permit obtained was insufficient authority. Nor did Judge Cardozo sit on that case).

The statement of Judge Crane seems worthy of adoption. His reference to "absolute nuisance of extreme danger" is properly interpreted as meaning nuisances per se as defined by Judge Vann in Melker v. City of New York, supra. That is, those which are nuisances at all times and under all circumstances, regardless of location and surrounding. In other cases of absolute nuisance, questions of surrounding circumstances are considered in determining whether the condition involved is an absolute nuisance. Care of the defendant is not one of these circumstances. Yet a finding of lack of care on another state of facts results in what is known to the law as nuisance arising from negligence. In determining what conduct by the plaintiff shall constitute a defense to each of these two findings, we have discovered that the distinction is a shady one, mainly one of degree of care exercised. Contributory negligence is failure to exercise ordinary and reasonable care under all the circumstances. In short, where there is a question of fact, the jury determines whether the plaintiff's conduct bars his cause of action. The jury makes this same determination whether th cause of action be termed absolute nuisance or nuisance arising from negligence. The degree of care imposed on the plaintiff is governed by the circumstances in each case. The attempt to draw legal lines of cleavage has led only to confusion and should be abandoned.

JAMES EDWARD BREARTON

HABEAS CORPUS

A writ of habeas corpus is often thought of, by the layman at least, as an easy means of causing the release of a prisoner. Such an idea is not a healthy one, nor a true one, for habeas corpus is a protection which we gave to ourselves and which we alone can take away.

Section 9 of Article I of the United States Constitution and §4 of Article I of the New York State Constitution provide that the privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require its suspension.

Relief from illegal imprisonment by means of this remedial writ is not the creature of any statute. The history of the writ is lost in antiquity. It was in use before Magna Charta, and came to us as a part of our inheritance from England, and exists as a part of the common law of the State. It is intended and well adapted to effect the great object secured in England by Magna Charta, and made a part of our Constitution, that no person shall be deprived of his liberty "without due process of law."

Outside of special statutes authorizing the writ of habeas corpus in particular cases, the statutory provisions relating to the writ are now contained in Article 77 of the Civil Practice Act. The numerous writs under the common law have been gradually eliminated from our practice. The Civil Practice Act abolished all State writs, except the writ of habeas corpus and certiorari, to inquire into the cause of detention. On account of the constitutional provision it was thought unwise to attempt to abolish the writ of habeas corpus.

This writ is protected by very stringent safeguards. It cannot be abrogated nor its efficiency curtailed by legislative action. Cases within the relief afforded by it at common law cannot, until the people voluntarily surrender the right to it by an amendment of the organic law, be placed beyond its reach and its remedial action. The privilege of the writ cannot be even temporarily suspended except for the safety of the state in cases of rebellion or invasion. The jurisdiction of the Supreme Court in habeas Corpus is beyond the power of the Legislature to disturb. (People ex rel. Patrick v. Frost, 133 App. Div. 179).

The writ of habeas corpus (habeas corpus ad subjiciendum et recipiendum) has for its great object the liberation of those who may be imprisoned without sufficient cause. It is directed to the person detaining another (the sheriff of the county, the warden of a penitentiary, etc.) commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.

Strictly speaking, it is not an action nor suit, but is a sum-

mary remedy open to the person detained. It is civil rather than criminal in its nature, and it is a legal and not an equitable remedy. Much controversy has arisen as to whether a proceeding for a writ of habeas corpus is a civil or a criminal action, or a special proceeding; also whether it is a proceeding in the original action or proceeding, or an independent action or proceeding. The determination of this question is important upon the question of review, and in respect to the jurisdiction of the reviewing court.

The Supreme Court of the United States holds that the writ of habeas corpus is a new suit brought by the petitioner to enforce a civil right, which he claims as against those who are holding him in custody. The judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. It is not a proceeding in the original action. Thus, where a Federal statute provided in substance, that upon division of opinion, upon any question on the trial or the hearing of a criminal proceeding before a circuit court, the point of difference might be certified to the supreme court, it was held that the supreme court had no jurisdiction where a question was so certified, where the prisoner was held under criminal process for the reason that the writ of habeas corpus was a civil suit or proceeding, and there had been no final judgment in the circuit court. (Ex parte Tom Tong, 108 U.S. 556).

The writ of habeas corpus is intended, not to punish the respondent for illegally restraining the petitioner, but solely to free the petitioner from said restraint. In People ex rel. Armstrong v. Quigley, 75 Misc. 151, it was said, "the object of the writ is not to determine whether a person has committed a crime, but whether he is illegally imprisoned or restrained of his liberty." All that a court before which a prisoner is brought under a writ of habeas corpus may inquire into, is the question of jurisdiction. If the trial court had jurisdiction to pronounce judgment and sentence, the writ must be dismissed, and the court cannot inquire whether the decision is right or wrong, since "jurisdiction" connotes power to hear and make a determination of the charge, and erroneous exercise of jurisdiction does not constiture a lack of jurisdiction. The court has no power on habeas corpus to re-try questions of fact on which the findings of a court of original jurisdiction must be presumed to have been predicated. In People v. Ruloff, 5 Parker C.R. 77, the court said, "the question of a person's guilt or innocence of a crime for which he has been indicted cannot be inquired into, on application for discharge on habeas corpus." We might note also, that it has been held "that the action of the Board of Parole in declaring a prisoner delinquent is a discretionary one and is not subject to review in a habeas corpus proceeding." (People ex rel. Kleinger v. Wilson 254 App. Div. 406).

Section 1230 of the Civil Practice Act provides for those entitled to writs: "A person imprisoned or restrained in his liberty, within the state, for any cause or upon any pretence, is entitled, except in one of the cases specified in the next section, to a writ of habeas corpus or a writ of certiorari, as prescribed in this article, for the purpose of inquiring into the cause of

the imprisonment or restraint, and in a case prescribed by law, of delivering him therefrom." The general rule is that in order to make a case for habeas corpus there must be actual confinement or the present means of enforcing it. Mere moral restraint is not sufficient. (Wales v. Whitney, 114 U.S.564). In that case a court-martial was ordered to try a surgeon-general of the navy, and the secretary of the navy notified him thus: "You are placed under arrest, and you will confine yourself to and in the limits of the City of Washington." It was stated by the court that it was evident that the petitioner was under no physical restraint. As a naval officer, the secretary of the navy could order him to remain at Washington, and he could not leave without obtaining a leave of absence. There was no more restraint of his personal liberty by the order of arrest than there was before.

Such is true also where parties under indictment have given bail for appearance to answer the indictment. They may be under moral restraint, but are not under such physical restraint that habeas corpus will lie.

Though §1230 provides that a writ lies to inquire into the cause of imprisonment, it might be noticed that the court in People ex rel. Bedell v. Kinney, 24 App. Div. 309, said: "When a person has been imprisoned under a sentence part of which is legal and part illegal, he is not entitled to a writ of habeas corpus to inquire into the unlawful part, until the legal period has expired."

However, in People ex rel. Devoe v. Kelley, 97 N.Y.212, the prisoner was convicted of the crime of assault in the third degree and sentenced to be imprisoned at hard labor in State prison, for the term of one year, and upon habeas corpus proceeding the Court decided that the sentence was without authority of law, and void, that the offense was a misdemeanor and punishable only by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than $500, or by both, as then provided by §15 of the Penal Code, and that, as the Court of Sessions had exceeded its jurisdiction in rendering such judgment, it could not be enforced. "But", the Court went on, "conviction is still valid and the prisoner not entitled to his discharge. He should be remanded to the sheriff in order that the Court of Sessions may deal with him according to law." It will be noted that in this case the sentence was a unit.

The imprisonment or restraint referred to in §1230 does not refer exclusively to confinement in a prison. Domestic Relations Law §70 provides that a husband or wife, being an inhabitant of New York, living in a state of separation without being divorced, who has a minor child, may apply for habeas corpus to have such child brought before the court, and on return the court may award the custody to either parent for such time, etc., as the case may require. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

We see, therefore, that under §70 of the Domestic Relations Law, and §1230 of the Civil Practice Act, a writ of habeas corpus

may be had to determine the custody of an infant. But the statutory provisions are only permissive and do not give an absolute right to either parent. In People ex rel. Pruyn v. Walts, 122 N.Y. 241, it was held that "though the writ may be said to be by virtue of the common law, the court in making its decision as to the custody of the child is governed by equitable considerations." And, in a case where the court had jurisdiction of the father, it required the production of the child, of whom he had custody, even though he was living in an adjoining state.

But a parent has no right to a writ where a child has arrived at years of discretion and expresses a desire to remain away from the parent. When a child is of sufficient age to exercise discretion in choosing its custodian, the court, on habeas corpus, will see that the child is allowed to go with such parent as it may choose, but when the child is of tender years the court will name the person entitled to its custody.

An interesting statute in reference to children and habeas corpus is contained in §71 of the Domestic Relations Law, which provides that if it shall appear on the application, or the return of the writ, the husband or wife of the applicant has become attached to the society of Shakers, and detains a child of the marriage among them, and that such child is secreted or concealed among them, the court may issue a warrant in aid of such writ of habeas corpus, directed to the sheriff of the county where the child is suspected of being, commanding such sheriff, in the daytime, to search the dwelling-houses and other buildings of such society, or any members thereof, for such child, and to bring him before the court, and the sheriff must forthwith execute such warrant.

A person held under a warrant of extradition may sue out a writ of habeas corpus. This proceeding is a summary one and is to be kept within narrow bounds. When the extradition papers required by statute are in the proper form, the only evidence sanctioned is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed. In an extradition proceeding, the question whether prisoner is a fugitive from justice is for the determination of the governor of the state in which prisoner is found, and his conclusion must stand in a habeas corpus proceeding unless clearly overthrown. It is the duty of the petitioner to show that he was not in the demanding state when the crime was committed, and is not a fugitive from justice. When the preponderance of evidence sustains his contention he will be released. The certificate of the governor of the demanding state is at least prima facie proof of proper indictment, and, on habeas corpus, the accused person must show that he is illegally held. Identity of name raises a presumption that the person in custody is the person accused in the indictment, and the accused must show clearly that he is not such person. In People ex rel. Doyle v. Atwell, 232 N.Y.96, it was stated that a writ of habeas corpus cannot take the place or perform the functions of an appeal from a judgment of conviction. The court before which a person is brought under such writ simply inquires whether the court rendering judgment had jurisdiction to do so. If that fact appears, and the mandate under which the defendant is held be regular upon its face, the writ must be dismissed.

In People ex rel. Scharff v. Frost, 198 N.Y. 110, where the accused pleading guilty to seduction, married prosecutrix before the rendition of the judgment, and the court, though informed of the marriage, suspended judgment and released the accused from custody. Subsequently the suspension of sentence was revoked and relator was sentenced to imprisonment. While in jail under the judgment pronounced against him, he sued out a writ of error. The Court of Appeals held that while it was error for the judge, being apprised of the fact of the relator's marriage, to pronounce judgment against him, still there was not such an utter lack of jurisdiction or power to pronounce judgment as entitled the relator to relief by habeas corpus. The Court pronouncing judgment had jurisdiction of the defendant and of the offence, and under the plea of guilty was empowered to pronounce the sentence which it did pronounce unless the fact of the defendant's marriage to the complainant was established by competent proof. If the court had determined that no marriage had in fact taken place, its jurisdiction to render the judgment would be unquestionable. The fact that the marriage is admitted in this habeas corpus proceeding cannot affect the question of the court's jurisdiction. Having so decided, the Court went on to say that "the relator's remedy was to move in arrest of judgment, and upon the denial of that motion if it were denied, he could review the action of the trial court upon appeal."

This has been a cursory review of the purpose and function of the writ of habeas corpus. Much has been excluded which has a right ful place within any writing upon the subject, but in this instance, has been omitted in the interests of points considered especially important, by the writer.

HAROLD EDWARD KOREMAN

FORCE AND EFFECT OF §376 GENERAL BUSINESS LAW

Since Colonial days usury laws have been on the statute books of the State. Although few changes have been made in the usury laws, new problems are presented. Since usury is of social and economic concern there exist different remedies depending upon the philosophy which is believed. There are those who look upon usury as malum in se, while others see it as merely malum prohibitum. The old English rule held that no recovery at all could be had by the usurer. Some states allow recovery of the principal while others provide for recovery of the principal but at the same time inflict a forfeiture of a sum greater than the usurious interest. (See Williston, Restatement of Contracts §526, Special Note). Our courts of equity formerly would compel the borrower to repay the sum received as a condition to equitable relief (Livingston v. Harris, 11 Wend.329), but the Legislature has expressly abolished this. (Gen.Bus.Law §377). However, our courts do not look on usury as malum in se, but insist that the borrower must expressly insist on his rights to secure relief. The Legislature has since early days sought to make the law stringent enough to put a stop to the victimizing of the poor. The courts have sought to lessen the harsher provisions by preventing unjust enrichment by the borrower's taking advantage of the statutes. This conflict of philosophies has led to some inconsistencies.

Our New York Usury Law is found in Article 25 of the General Business Law §§370-382. (Cf. Penal Law, Banking Law). Although this discussion is a limited one, it may prove helpful to give a short summary of the article in the General Business Law. Section 370 provides for interest at no more than 6% per annum; §371 forbids usury; §372 provides for recovery of excess interest by the borrower within one year and a two-year statute of limitations after that during which time the overseer of poor of the town where payment is made, or county superintendent of poor may recover; §374 deprives corporations of the defense of usury; §375 provides limitations in the assignment of a cause of action for usury; §377 provides that the borrower shall not have to pay back the sum loaned in any action brought by him.

Sections 373 and 376 have been purposely omitted from the above summary for it is with these two that we are specifically concerned. For that reason these parts of the law are here quoted in full:

> §373. Usurious contracts void. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, whereupon or whereby there shall be reserved or taken, or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods, or other things in action, than above prescribed, shall be void.
>
> Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof that any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt, has been received in violation of the

foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled.

§376. Return of excess a bar to further penalties. Every person who shall repay or return the money, goods or other thing so taken, accepted or received, or the value thereof, shall be acquitted and discharged from any other or further forfeiture, penalty or punishment, which he may have incurred, by taking or receiving the money, goods or other thing so repaid, or returned, as aforesaid."

A first reading of the two statutes would lead one to believe that although the former recites that usurious contracts are void, nevertheless, by a return of the excess interest, the usurer could compel repayment of the sum loaned at the legal rate. A study of the adjudicated cases will show such a hasty conclusion to be untrue.

It is to be remembered that although §373 states that usurious contracts are void, the defense of usury is an affirmative one and must be pleaded and proved. (Haywood v. Jones, 10 Hun 500). A failure to plead distinctly and correctly will result in a loss of the defense and an usurious contract will be enforced. (Fay v. Grimsteed, 10 Barb. 321). In a similar way is §376 misleading. At first glance it would seem that only the excess interest need be returned to take advantage of the relief offered. The courts have held that the return under this section must be complete and unconditioned. Return of excess interest alone is insufficient. Curtiss v. Teller, 157 A.D.804; affirmed 217 N.Y.649, is the leading case on this proposition. That was an action by the borrower for money had and received when the lender's assignee sold stock pledged as collateral and applied the proceeds to the debt. The defendant tendered back the excess interest, pleading §376 as a defense to plaintiff's action which he contended was based on a forfeiture. Plaintiff sought the entire value of the collateral. In this case, Presiding Justice Kruse gives an excellent synopsis of the history of usury laws and the attempts of the courts to avoid forfeitures and unjust enrichment. To uphold the defendant's contention would have been to restore the old chancery rule where the borrower as condition to securing a bill of discovery had to offer to pay back the sum loaned at the legal rate. The court held that the consolidation of 1909 did not have that effect. At page 817, Justice Kruse had this to say:

"I think the repayment of the money, goods or other things so taken, accepted or received, or the value thereof which acquits the lender, referred to in §376, includes obligations or securities which, under the provisions of §373, the court may declare void, and enjoin prosecution thereon and order surrendered and cancelled. It is true that if a lender makes so complete a restitution there would seem little or nothing left for which he could be prosecuted under any provision of the usury article, irrespective of the acquittance under 376, with the possible exception of the forfeiture under 372, unless he would still be liable to criminal prosecution under the Penal Law." (Curtiss v. Teller, supra.)

The defendant sought to uphold his position under dictum of Judge Willard Bartlett in People v.Young, 207 N.Y. 522, 531. "I think that the phrase 'forfeiture, penalty or punishment' contained in §376 of the General Business Law, relative to restitution, comprises only such forfeiture, penalties or punishment as are mentioned in the General Business Law itself....." By inference defendant pleaded that §376 was there held to include all such forfeiture, punishment or penalty. The Court did not uphold such conclusion and under §373 allowed the plaintiff to recover the entire value of the collateral.

In the Supreme Court opinion in Jefferson Title and Mortgage Corp. v. Dempsey, (153 Misc.32), Curtiss v. Teller was criticized as being in conflict with People v. Young, (207 N.Y. 522). However, the Jefferson case was modified in the Court of Appeals (226 N.Y. 190) since no usury was found to exist in the mortgage debt sought to be foreclosed. In the opinion modifying the decision the Court had this to say: "Repayment of usurious interest received is the condition which the statute exacts for a discharge of forfeiture which would otherwise be the result of usury.... Perhaps the discharge of 'forfeiture' within the meaning of the statute because of usury would not avoid the defense of usury. We assume that the statute would not have such effect. That question is not before the Court since here there is a finding that there was no usury." (id. pp.194-195).

It is thus seen that the repayment called for in §376 is interpreted to mean a complete restitution by the lender of everything he has received. This restitution must be unconditional. Matter of Baker, (77 Misc.90, 94) held that §376 afforded no relief "to one who proposes restitution only in the event that the usurious contract shall be upheld."

In view of what has thus far been said, what is the force and effect of §376? In the first place, the defense of usury cannot be destroyed by a tender of the excess interest nor even by a complete restitution. If the borrower desires to insist upon his rights under §373 to have the contract declared void, this he can do and no return of excess interest or any obligations given can deprive him of this right. People v. Young (supra) holds that a complete restitution is no defense to an indictment under §314 of the Banking Law

The latest discussion of this subject is found in the case of Bowery Savings Bank v. Nirenstein, (269 N.Y.259) decided in December of 1935. That was an action to foreclose a mortgage. The defense of usury was interposed, whereupon the plaintiff tendered the excess interest which amount the court fixed upon motion by the plaintiff. The Court of Appeals did not consider the procedural question, stating that its construction of §376 would render it unnecessary. The following question was raised: "Assuming that after a proper trial of the issue as by the answer, it is found that usurious payments were made, may the plaintiff then by a mere deposit of the usurious excess relieve itself of further consequence for its wrongs in a civil action?" (id. p. 263). In this manner the court would seem to be limiting its decision to that question alone. However, the court speaking through Justice Finch went further and in forceful language upheld the case of Curtiss v. Teller (157 A.D.804; affirmed

217 N.Y. 649) where an unconditional tender was made before any trial began or any issue was joined. In answer to the question posed the court replied as follows: "The question is no longer open in this court. In Curtiss v. Teller [supra] former Presiding Justice Kruse of the Appellate Division, Fourth Department, after ably reviewing the historical development of the statutory law upon this subject, reached the conclusion that the above quoted §376 could not be construed so as to exempt the userer from any further consequences by the mere deposit of the amount found to be usurious." (id. p. 263).

The court then cites Sabine v. Paine, 223 N.Y.401, 405, to the effect that §373 is "peremptory and unequivocal in enacting that an usurious obligation is absolutely void." From this is drawn the conclusion that "§376 was never intended and cannot mean to emasculate §373. Insofar as usury permeates the transaction the restitution must be complete. It is true that if a lender makes so complete a restitution, there would seem little or nothing left from which he could be acquitted or discharged. This section, however, must be read in the light of the fact that at one time there existed a penalty of treble damages for usury which has since been repealed." (Bowery Savings Bank v. Nirenstein, 269 N.Y. 259, 263).

In my opinion the court by this last statement has deprived §376 of any force and effect whatsoever. The cases cited above have gradually disposed of situations where it might have been applicable. Whether such a restitution could be used to enjoin prosecution under §2400 of the Penal Law is open to question. Why §376 was retained does not appear. Perhaps it was intended that if the lender paid back everything he received he could then sue to recover the sum loaned with legal interest on the ground of moneys had and received. If so, at what point was restitution to be made? To enforce the statute might perhaps lead to greater evils when the usurer knew that he could avoid the defense of usury by merely returning the excess. Whatever the true reason may be, I believe that §376 is today of no force whatsoever.

ARTHUR ANSTY DARRIGRAND

THE MEANING OF SELF-INCRIMINATION

Recently there has been much discussion in New York as well as in other States concerning the right to comment on the failure of the accused to take the witness stand. The discussion has taken the form of active dissatisfaction with the standard rule forbidding comment. Judge Hiscock, in an oft-quoted statement, has made the position of those advocating a change quite clear. "It is quite hopeless to expect to modify human nature by mere statutory enactment or to successfully direct intelligent men not to see what actually transpires before their eyes. * * * * At least the repeal of this provision would repeal what is frequently a species of legal hypocrisy, whereby courts and jurors are compelled to assume an appearance of disregarding and forgetting something which it is practically impossible for either of them to disregard or forget * * * ." (Criminal Law and Procedure in New York, 26 Col. Law Review 253).

Before proceeding further, it seems proper to present the legal setting in which this problem appears. We have in our New York State Constitution Article I §6, the provision: "Nor shall he be compelled in any criminal case to be a witness against himself."

From the time of the inauguration of our State into the new Union until the year 1869, this provision does not seem to have had much use. Moreover, it could have no use in any situation where the accused was concerned since the accused at common law was not a competent witness in his own behalf. He shared the disability with which the common law clothed parties to a litigation, apparently for the reason that it was felt he should be protected against himself; that the urge to perjure himself when he was placed in the witness chair with such a great interest would be too strong to make his evidence of any value. (Greenleaf, Evidence, p. 500 §362).

But in 1869, the Legislature departed from this rule and enacted the law which appears today in §393 of the Code of Criminal Procedure. This section now reads:

> "Defendant as a witness. The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him."

The proposed amendment would delete the last part of this clause and substitute in its place the clause

> "His failure to testify may be the subject of comment by the Court, the prosecuting attorney and the counsel for the defendant."

This is the wording as proposed by the Judicial Council in its 1937 report.

The question would then, for the first time in the State of New York, be squarely presented as to whether comment of this sort would violate the constitutional guaranty. It is this question I should like to discuss. In speaking of the constitutional guaranty, I refer to the already-mentioned provision in the State Constitution. Although there is a similar provision in the Federal Constitution, there is no Federal question involved here. The provision in the Federal Constitution applies to Federal courts only. The attempt was made moreover in Twining v. New Jersey, 211 U.S.78, to bring this right within the privileges and immunities of the national citizenship which could not be impaired by State action. But the attempt failed. The court decided that the right was not a part of due process. "Is it", the Court asks, "a fundamental principle of liberty and justice which adheres in the very idea of free government and is it the inalienable right of a citizen of such a government?" The court decided that it was not, but it was very careful to point out, "We have assumed for the purpose of discussion that what was done in the case at bar was an infringement of the privi- against self-incrimination. We do not intend to lend any countenance to the truth of that assumption. * * * The authorities are in conflict and we do not pass upon the conflict."

It is conceded that the overwhelming majority of the states do not allow comment of the sort proposed here. But this fact should not in and of itself be allowed to carry any great weight, without an analysis of how these states have arrived at their decisions. The thing which caused the complications, as may well be suspected, was the common law rule respecting the incompetency of the accused as a witness. Add to this the additional fact that some states have no constitutional guarantees at all concerning incrimination and the significance of the decision begins to wane.

The first class of cases is comprised of decisions of states which have never had any constitutional provision. In this group are New Jersey and Iowa. (State v. Height, 117 Ia.650; Gallagher v. State, 142 Atl.365; Parker v. State, 39 Atl. 651; People v. Zdanowitz, 55 Atl.743). These states, incidentally, have allowed the comment. Apparently they are of little value on the question of constitutionality here, except as they indicate a policy, a tendency to treat the comment as reasonable and not prejudicial. In the Zdanowitz case, however, the Court makes the statement

> "Although it has not been deemed necessary to insert in our constitution this prohibitive provision, the common law doctrine unaltered by legislation or by lax practice is by us deemed to have its full force."

Assuming the common law right was the same as the constitutional guaranty which we have today, this statement might make the New Jersey decisions of argumentative value to us. But as we have seen, it is hard to discern how the guaranty at common law had any relation at all to the accused. I hazard the guess that the incompetency of the defendant was perhaps an aspect of the growth of the guaranty at common law. Moreover, it should be remembered that our constitutions were the expression of a dissatisfaction with the English administration of the common law insofar as the provisions concerning the criminal law was concerned. Hence what the nature of the common law right was in this relation is not going to be very valuable.

Although at this point it is a digression, it should be mentioned that the English courts have allowed comment. (Rex v. Rhodes, (1899)1 Q.B.77; Ex Parte Kaps (1894) A.C.650). The phrase was borrowed from England and certainly some weight is due to its subsequent history.

The second class of cases are those where there was a constitutional guaranty similar to the one in New York and at a later date by statute the accused was declared to be a competent witness, without any provision forbidding presumption from failure to take the stand. (Bird v. State, 50 Ga.585; Price v. Commonwealth, 70 Va. 393, State v. Howard, 35 S.C.197). These cases are not as helpful as they might be since the courts plainly have in mind the great change to be effected by the "competency of the accused" statutes which made comment on failure to testify a live issue. They are proceeding cautiously, and in both the Georgia and the Virginia cases, they find what amounts to an implied condition in the competency statutes that the failure to testify shall not raise any presumption against the accused. In the South Carolina case, the constitutional question does get an audience but the treatment seems to be superficial.

The third class is where there is a constitutional provision containing the guaranty and also a constitutional provision exempting from the guaranty comment on the failure of the accused to take the stand. Ohio is the only State to adopt this expedient although it has been attempted in other states, including New York.

The fourth class is the group in which we find most of the States. There is here a constitutional guaranty and a later statutory provision making the accused competent and including a statement that failure to testify shall not prejudice him. The statements in these jurisdictions as to the constitutionality of our proposed amendment are, of course, wholly dicta.

The fifth and final classification is our situation: -The constitutional guaranty, a later statute permitting the accused to testify but denying the right to comment on his failure to do so, and a still later statute amending this statute to allow comment. This has been tried only in South Dakota and the court there (State v. Wolfe, 266 N.W. 116), promptly declared in unconstitutional - not, however, without a vigorous argument by two judges, both dissenting, with opinion. Suffice it to say that the argument in the majority opinion is not convincing. It placed reliance on previous dictum of the same court, and is obviously impressed by the overwhelming preponderance of statute which does not allow comment. The opinion was bolstered, however, by the statement that great prejudice would result from a coercion of the sort which would bring the defendant to the stand to be subjected to a cross-examination as to his whole life record. Although this question is, to my mind, incidental to the main issue, it is a consideration which is bound to enter the minds of the court and it is significant that the recommendation of the Judicial Council has included a provision to the effect that when the accused takes the stand in his own behalf, he may not be cross-examined as to any crime other than that for which he is charged, except perjury.

This comment, it is agreed by all, is going to bring the defendant-accused to the witness stand. Knowing that if he doesn't take the stand, the Court will in all probability comment upon it, and the Jury will probably believe he has something to hide, he will be impelled to testify. There is certainly some form of compulsion here. It would seem that the way to decide the answer to whether it is the type of compulsion prohibited by the Constitution, would be to look at the practice of the right and determine what sort of force is there prohibited.

Now, the guaranty may be exercised, and I suspect was primarily designed to be exercised before a man is placed in the witness chair. But this situation occurs only when he is in the position of the accused. In most situations a man may be compelled to take his place in the witness chair by subpoena, and it is up to him to see that he is not compelled to testify against himself. The guaranty has had to be extended to cover compulsion in both civil and criminal cases. "In a criminal case" refers rather to a compulsion directed toward conviction of crime rather than the type of action in which it can occur. Moreover, it is clear that a man can exercise the privilege when he is upon the stand testifying in another criminal action, although he cannot claim that his right is violated because he is compelled to come to the stand. The only time that there can be a violation of the right by compelling a man to take the witness stand must occur when the man is in the position of the accused. In all the other cases, as I have indicated, compulsion to take the witness stand is not bad in itself. It is only when the compulsion to take the stand could be for but one purpose, namely, to testify against himself, to make out a crime against himself, that the guaranty is violated.

That settles the locus of the compulsion; now for its nature. There are not a great many cases here. It is so flagrant a violation of the right that hardly anyone would blunder into a violation. In People v. Ferola, 215 N.Y.285, there is a close approximation of this situation. There, testimony of the accused taken at a coroner's inquest was introduced at the trial. At the time of the inquest the accused was under arrest. It was not a court, but a proceeding judicial in its nature, where testimony was taken under oath. The accused was taken there while in police custody for the purpose of testifying. The compulsion can be seen in the fact that the woman was under arrest and in custody. Even with this compulsion, she could waive her rights, but the facts in the case were insufficient to show waiver. Compulsion was direct. She was under arrest. People v. Molineux, 168 N.Y.264, is to the same effect. These are the only cases I find which illustrate the nature of the prohibited compulsion when applied to a situation in which the witness is compelled to take the witness stand.

The majority of cases, illustrating the practical aspect of the guaranty, decide questions arising after the defendant has taken the witness stand. The question always is, can the witness refuse to answer a particular question in the course of his examination. The burden, as we have seen, is on the witness to protect himself (People v. Cahill, 193 N.Y.232), and his decision concerning the tendency of any statement to incriminate him is conclusive upon the Court (People ex rel. Taylor v. Forbes, 143 N.Y. 219). That the

witness can refuse to answer implies a protection of compulsion of some sort. But what kind of compulsion, is not quite so clear. If the court directed the witness to answer over his objection, and he complied, his right would, I believe, be violated. But, suppose the court argued with him and indicated that he ought to testify. This sounds absurd, but it seems to illustrate what I mean. Would the right be violated here? I think not.

It is pointed out in cases, which assume to make a definition of the right, that it is the improper use of legal process which constitutes the prohibited compulsion. In People v. Ales, 247 N.Y. 351, the Court says

> "The purpose of the privilege * * * has been to prevent the employment of legal process to extract from a person's lips, an admission * * *."

Now, in cases where a witness is on the stand testifying because he was subpoenaed, and an incriminating question is asked, we could say that the process, insofar as it related to the question of the witness' own crime, is illegal. But what of the witness who is testifying of his own accord? We know that the guaranty can be violated as to him, too. Evidently, the legal process in a strict sense need not be present. At any rate, it is a direct pressure in the ordinary case. There are several cases, however, which illustrate a compulsion of another sort.

In People v. Gibson, 218 N.Y. 70, there was a demand made upon the accused for the production of a document in his possession. The Court decided that this was error. They followed McKnight v. U.S., 115 Fed.972, which was identical as to the facts. They say

> "It is because we deem the demand upon a defendant to produce alleged incriminating evidence in his possession, to be precisely such moral compulsion as Justice Holmes mentions.**** It is the only effective method of preventing a practice which virtually deprives the defendant in a criminal case of a right guaranteed him by the Constitution."

In the case of People ex rel. Vorenoff v. Mallon, 222 N.Y.456, there was involved a statute making failure to allow comparison of the books of a corporation with a statement made to a creditor, presumptive evidence that the statement made was knowingly false. In relation to the argument that the statute compels the defendant to incriminate himself, the Court says:

> "It is always open to the defendant to explain away the presumption by showing through testimony other than his own, the destruction or loss of his books."

This, however, is not a very convincing argument, especially in view of the fact that the very case at bar is an example of a presumption which, as a matter of fact, must call upon the defendant to rebut. By his own statement, it relates to his own mental condition. The Court evidently with this in mind, goes on:

> "The presumption that his statements are false arises naturally

out of other facts which must be proven and the statute only authorizes a conclusion to which reasonable men would arrive from these facts."

People v. Courtney, 94 N.Y.490, presented the situation whether or not the statute making the accused a competent witness did not of itself violate the constitutional guaranty. The argument there was that the statute placed the defendant in a position in which, despite the fact that it was stated that no presumption could be indulged in because of failure to take the witness stand, the inference naturally and inevitably was presented to the minds of the jurymen that the defendant did not take the stand because he had something to hide. The Court plainly states:

"The Constitution primarily refers to compulsion exercised through the process of the courts, or through laws acting directly upon the parties and has no reference to an indirect or argumentative pressure such as is exerted by the statute of 1869." (People v. Courtney, supra).

These three cases all present situations in which there is a moral and indirect compulsion exerted against the defendant, while in the presence of the court, to take the stand. In the Courtney and the Woronoff cases it arose from the situation itself and the action of the Legislature in creating that situation in both cases can be justified on other grounds. There was not the primary purpose to compel the defendant to take the stand.

In the Gibson case, the inference is latent in the situation, but the court prohibits any express reference to it. It may be tha the court will accept an indirect compulsion which arises in the course of legislation justifiable upon other grounds, but that it will not countenance any unnecessary reference to it. It may be, in view of the fact that the defendant is before the court, and possibly in awe of the court, that a broad view will be taken of the nature of the compulsion.

The argument at this point is that even though the contemplate compulsion is a direct one, an indirect pressure will virtually deprive the accused of the benefit of the right, and will be a defeat of the right by indirection. This can't be answered successfully in advance. It can be said that technically the right does not embrace argumentative pressure, and yet the court might be convinced that that defeats the right. All we can say is that the examples of indirection in the cases, which have been struck down are "equivalents set up outside of the natural operation of the right, and not indirect 'pressures.'" Such is the case of People ex rel. Ferguson v. Reardon, 124 A.D.818. There refusal to submit company books to state inspection was made a crime. If you wished to exercise your right you were made guilty of a crime. Here, there was not any question of a different sort of pressure, but rather the resolute nullification of the value of the right by reason of facts external to the situation.

In the application of any rule of law the reason and purpose behind the form of protection which is adopted oftentimes is forgotten and the emphasis is placed on the strict "thou shalt not" which is the form of the law. Especially is this so in the case of

constitutional guaranties. The guaranty is the means adopted to curb a particular evil which may or may not appear in the working of guaranty. Although it seems that it is a particular kind of compulsion which is comprehended in guaranty against self-incrimination, and this is important to us, it would be idle to assume that the compulsion itself is the thing which is feared.

> "The reason for conferring the privilege against self-incrimination was not to protect a person merely from being compelled to disclose facts that would tend to incriminate him but to protect him against being compelled to furnish evidence that could be used as the basis for bringing and prosecuting criminal proceedings against him." (Rottschaefer on Constitutional Law, p. 803).

> "The object of the Amendment is to establish in general principles and upon a firm basis the general principles of English and American Jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime." Hale v. Henkel, 201 U.S.43.

It becomes apparent that the guaranty is a protection against the possibility of the prosecution making up its case from the admission of the defendant. It is a protection against being brought into court to be tried for a crime on your own statements. If this be the reason, there is no point in applying the rule to this situation. The prosecution must in any event make out its case with other evidence. If it fails, the case must be dismissed. The comment is not evidence itself. The situation is analogous to the rule in civil cases where it is permissible to comment upon the failure to produce evidence in the presence of the defendant which would have been material to the case. There it is uniformly held and is perfectly well established that the comment does not take the place of evidence. (Meagley v. Hoyt, 125 N.Y.771; Leeds v. Metropolitan Gas, 90 N.Y.26; Shotwell v. Dixon, 22 A.D.258).

As for dictum, the Court of Appeals recently, in the case of People v. Reese, 258 N.Y.89, went to great pains to point out that they were not deciding the question:

> "We have no thought in thus holding, to intimate a belief that a statute permitting adverse comment in such circumstances would impair the constitutional guaranty against self-incrimination. **** If the Legislature desires to abrogate that exemption let it speak with a clearer voice."

It was argued there that §393 Code of Criminal Procedure applied only to proceedings by indictment and that when the Legislature created an action to proceed by information, comment on the failure of the accused to take the stand could be allowed. This is the latest pronouncement of the Court of Appeals on the subject. Of course, all direct statements on the constitutionality of comment must be dictum, since the question cannot be properly before the court. But it does indicate that it is not settled in the minds of the judges.

The first dictum in the State occurred in People v. Ruloff,

45 N.Y.213. The Court in that case was obviously displeased with the competency statute, anyway. They said the constitutional right "will be practically abrogated." If comment is allowed, then the defendant is "morally coerced****although not actually compelled to be a witness against himself." - What weight to give this is problematical in view of later decision in the Courtney case (supra)

As will be noticed, I have not made a comprehensive list of the arguments. It is plausibly argued that the defendant would not feel compelled to take the stand unless he were guilty; at least, that this is the dominant reason. It is stated that the framers of the Constitution could not have contemplated comment because the accused could not at that time testify. There are set forth in Wigmore on Evidence, Volume IV §2272, four arguments, pro and con. There is the usual "inevitable inference" argument, the claim that there is in reality an option, and that there is no actual extraction of a reply. The author has set forth arguments and replies in his usual adequate fashion and there is no purpose in repeating them. Also, there is the argument invariably found that the presumption of innocence is destroyed. This question is not one of constitutionality in the first place. Moreover, it seems that it would be perfectly competent for the courts to decide whether the presumptiom should be rebutted by acts or oral testimony.

Furthermore, I have omitted reference to consideration of policy. These arguments should be obvious. If I am mistaken, I refer you to an excellent article upon the subject which can be found in 26 Yale Law Journal 464. And, lest your intellectual appetite be neglected, I recommend two articles in the Michigan Law Review, Volume 31. A cautious regard for the impetuosity of youth impels me to omit further references.

BURNS F. BARFORD, JR.

"WITHOUT UNNECESSARY DELAY"

We direct attention herein to a change in the Code of Criminal Procedure. The true significance of the alteration can only be realized after a consideration of the problem popularly called "The Third Degree" for that problem is inseparably related to the statutory charge found in Chapter 202 of the Laws of 1939.

Years ago an enterprising newspaperman became outraged at the brutality of certain tactics used by law enforcement officers. In writing on the subject, he borrowed a term from the Master Mason's degree and dubbed the practices "the third degree." That term has survived the test of time and is used today with the same significance whenever incidents of police brutality are brought within the focus of the public eye.

The problem itself is not a new one, yet it remains before the bar today as one crying for a solution. The writers of ancient history and political philosophy inform us that Aristotle sanctioned the torture of prisoners as the surest method of procuring information. Opposition to such treatment arose when Cicero and St. Augustine denounced it. Modern times have found civilized people joining in the cry to outlaw the brutal treatment of prisoners; but nevertheless, almost powerless to eradicate it from the penal system because human frailties are often magnified in the beings of over-zealous police officers.

Section 165 of the Code of Criminal Procedure is a milestone in the progress made in reducing the opportunity for third degree practices. It provides: "The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night." In defining this section, the court has held that the words "without unnecessary delay" do not mean "immediately" but at the hour when the magistrate would ordinarily be at his office or court, adding, however, that in the meantime the defendant is entitled to give bail. (See City of Buffalo v. Neubeck, 209 A.D.386).

The courts have joined the Legislature in guarding the rights of persons held in custody by condemning police officials who have wilfully detained prisoners without arraigning them before a magistrate within a reasonable time. (See People v. Mummiani, 258 N.Y. 394). In 1935 the case of "Death House" Alex reached the Court of Appeals. Judge Lehman explained that police officials have no discretion as to when a prisoner shall be arraigned and that their desire to obtain evidence of guiltfurnishes no legal justification for delay. In writing the opinion of the Court in People v. Alex, 265 N.Y.192, he held that detention for 36 hours before arraignment is illegal and that "it is the duty of the trial judge, at least upon request of counsel, to charge that any 'unnecessary delay' in arraignment is forbidden by law and should be considered by the jury, in determining whether or not a confession was voluntary. (Page 195).

This brief observation of the efforts displayed by the Legislature and the courts may thus be divided into two classes. The first

is directed toward the actual treatment of the prisoner before trial. The Legislature has sought to reduce the period of time in which over-zealous police officers may find an opportunity to "work on" persons detained. In construing the statute, the courts have sought to lend effectiveness to the legislative command. The second relates to the reception of evidence and the conduct of the trial of the accused. Authorities need not now be cited to support the statement that confessions procured by torture and duress are excluded. The cases cited above disclose that the fact of illegal detention itself may be placed before the jury. Thus the courts have sought to remove the incentive which prompts brutality by police officers.

The statutory change in the Code relates to the first policy mentioned above - the reduction of the period of time between arrest and arraignment before the magistrate. On March 9, 1939, a bill was introduced in the Legislature amending §940 of the Code of Criminal Procedure. The section, before amendment, read:

> "§940. Identifying criminals; taking of fingerprints. In order that the courts and public officials dealing with criminals may have accurate information as to the identity of persons charged with crime, there is hereby conferred and imposed upon the chief of police or peace officer performing such functions, in each city, town or village, and upon sheriffs, members of the state constabulary, the railway police, the aqueduct police, the state park police and all other police officers making arrests, the power and duty of causing to be taken, upon arrest, finger- and thumbprints, and if necessary, the photograph, of every person arrested and charged with a felony or with any of the misdemeanors and offenses specified in section five hundred and fifty-two of this code."

The Legislature, apparently with a desire to add to the efficiency of the New York State Police, adopted the following amendment to §940 as provided in the proposal of March 9th:

> "Members of the state police, upon arresting a person or persons for any felony or any of the misdemeanors and offenses specified in section five hundred and fifty-two of this code, may transport and bring said persons arrested to their troop headquarters for the purpose of fingerprinting and thumbprinting and photographing.
> "§2. This act shall take effect September first, nineteen hundred thirty-nine."

This Amendment became Chapter 202 of the Laws of 1939.

We call particular attention to the authority granted to the State Police to take a person upon arrest "to their troop headquarters." The provision itself appears harmless enough - and perhaps even something to be desired. But whatever may be its merits, a closer examination of its implications convinces the writer that it provides a most effective means of nullifying the force of §165 of the Code requiring production of the person before a magistrate "without unnecessary delay."

In the first place - there are 62 counties in the State of New York. The amendment authorizes the taking of a prisoner to "troop headquarters." Where are troop headquarters? How many are there? An examination of the facts discloses that there are seven "troop headquarters" in the State. Troop A in Batavia, Troop B in Malone, Troop C in Sidney, Troop D in Oneida, Troop G in Troy, Troop K in Hawthorne, and the Long Island Park Detail in Babylon.

Thus the effect of the amendment is to give State Police authority to take persons arrested in any of the 62 counties to troop headquarters located in the general vicinity of the county of arrest. What then becomes the meaning of "without unnecessary delay"? It becomes quite obvious that snow-choked roads of the North Country and the crossing of miles of territory and county lines will afford ample justification for "delay" - and incidental thereto, provide a great opportunity for "discussion" with the prisoner before arraignment.

We call attention to this statutory change not for the purpose of entering into a controversy on its merits. We have no criticism of the general policies of law enforcement as carried out by the New York State Police. We fully recognize that a desire to eliminate "third degree" practices must not be carried to an extent that criminals may find additional immunity in the technicalities of the law. Nor should the zeal to eliminate police brutality be permitted to hamper the efficiency of law enforcement agencies. We call attention to the amendment for the sole purpose of informing potential attorneys and district attorneys of the possible consequences of its enactment. How the courts will deal with detention sought to be justified by this alteration would be mere speculation. It is sufficient that attorneys are aware of the change and its implications - for only then are they in a position to protect the interest of their clients.

R. BURDELL BIXBY

LIABILITY OF CERTIFIED PUBLIC ACCOUNTANTS

A recent case calls to mind an interesting phase of modern law not yet fully developed. In National Surety Co. v. Lybrand, 256 A.D. 226, the plaintiff surety company sues as subrogee of a firm of brokers. The complaint alleges that the defendant firms are certified public accountants hired to audit the broker's books; that the defendants failed to discover and report substantial cash shortages after such audit revealed or should have revealed them; that the cash shortages were caused by the embezzlement of the cashier of the brokers over a period of years; that had the defendants discovered and reported the cashier's misappropriations, the brokers would not have continued him in their employ nor sustained the subsequent losses. The court held that the plaintiff had made out a case sufficient to warrant submission to the jury.

"It was for the jury to say whether the practice of 'lapping or kiting' of checks should have put the defendants on inquiry which would have led to the discovery of the defalcation, and whether, if the defendants had exercised ordinary care and used proper methods of accounting as established by the expert testimony, they would have observed checks drawn out of numerical order." (National Surety Co. v. Lybrand, supra).

The case itself merely states what might be called the general rule, but it does touch indirectly on a topic that is still in the process of evolution.

The above case entails the liability of the public accountant to his employer. The topic referred to concerns the liability of the public accountant to third persons who have changed their position in reliance on his certification of the corporate balance sheet or other financial statement. Most of the difficulty in past cases has been that the plaintiff found it impossible to allege privity of contract or to prove active intentional fraud.

Our most recent Court of Appeals case on the subject is State Street Trust Co. v. Ernst, 278 N.Y.104. The plaintiff made a loan in specific reliance on the balance sheet of the borrower as certified by the defendant. The defendant, a public accountant, admits he knew that the balance sheet was to be used to obtain a loan. A comparatively short time after the loan was granted the borrower went into bankruptcy, despite the favorable condition as reflected by the balance sheet. It seems that after the loan was made the defendant sent a letter to the borrower commenting on and explaining the balance sheet. This letter contained comments not mentioned in the balance sheet, to the effect that scope of the audit by the defendant was limited in various particulars. The trial cour granted a motion to set aside a verdict for the plaintiff and direct ed a verdict fcr the defendant. The Court of Appeals held that "in the absence of a contractual relationship or its equivalent, account ants cannot be held for ordinary negligence in preparing a certified balance sheet even though they are aware that the balance sheet will be used to obtain credit (Ultramares Corp. v. Touche, 255 N.Y. 170). Accountants, however, may be liable to third parties, even when there is lacking deliberate or active fraud. A representation

certified as true to the knowledge of the accountants when knowledge there is none, a reckless mistatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth, are all sufficient upon which to base liability. A refusal to see the obvious, a failure to investigate the doubtful, if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability for losses suffered by those who rely on the balance sheet. In other words, heedlessness and reckless disregard of consequence may take the place of deliberate intention." (State Street Trust Co. v. Ernst, at p. 111).

The court held also that an accountant's duty is not discharged by merely representing or mirroring the books of the corporation. He must take reasonable care to ascertain that the books do show the corporation's true position. A new trial was granted on the ground that the plaintiff had made out a prima facie case. The decision was four-to-three with Judge Lehman dissenting on the ground that a mere error of judgment was involved such as to be unavailing as an inference of fraud.

Inasmuch as the above decision seems to be based on the distinction between ordinary negligence and fraudulent negligence it might be appropriate to state in brief just what the negligence consisted in in the State Street Trust Co. case. There the business of the corporation was to finance wholesalers or mills. Money was lent on the security of the inventory of the borrower or an assignment of the accounts receivable. These accounts receivable, as assigned, were listed in the balance sheet at over $2,000,000 with an allowance account for the contingency of a reduction in value. This allowance reserve was only $19,000, yet, to the knowledge of the defendant, according to their own statement in the delayed covering letter, a very large proportion of these commission accounts receivable "were comparatively inactive during the year and appeared slow of collection." In other words, a good proportion of the alleged asset account consisted of stagnant and unsalable inventories and accounts. Still, a very small reserve account was all that stood behind this $2,000,000 contingent asset. This the court held to be gross negligence, in not investigating further and in not commenting as to this factor on the balance sheet. The defendant's telling the corporation privately, created a situation which, although the element of actual fraudulent intent might be lacking, a "careless disregard of consequences" was clearly shown.

In Ultramares Corp. v. Touche, 255 N.Y.170, the court held that the facts, insofar as they related to the negligence cause of action, did not show such gross negligence as to permit an inference of fraud. There the junior accountant hired by the defendant, had been engaged in the posting of the general ledger of the factoring corporation. After he had finished, someone who was employed by the corporation entered, under his totals, a large amount, allegedly representing the month's sales. The junior accountant posted this, thinking that probably a check or verification would be made afterwards. This was held negligence but not sufficiently gross to warrant recovery by a third party.

The above cases are examples of the modern application of the doctrine that to state something of your own knowledge when in fact you possess no such knowledge, amounts to an agreement to take the consequences arising from a reliance on your statement. In the light of recent inventory scandals and large-scale frauds based on "high" finance and questionable accounting, it well befits the certified public accountant to tread with cautious feet. He must check the books of the corporation with more than a cursory skill. He must take care in just what words he certifies so as to escape the taint of active fraud. (Ultramares Corp. v. Touche, supra; Cf. Beardsley v. Ernst, 47 Ohio App.241, 191 N.E. 808). He must disclose all that is pertinent, in such a manner as to let it explain to third parties anything contained in the balance sheet which might require explanation. (State Street Trust Co. v. Ernst.) If he can avoid any affirmation of knowledge where he has none, and if he can so conduct his audit as to avoid gross negligence, he can operate in comparative safety, with a margin of allowance for honest error or innocent negligence. But caution he must have lest by a minimum of relaxation he expose himself to liability.

So far the cases that have been reviewed by high appellate courts have not been amenable to classification. The State Street case is the complement to the Ultramares case. The latter involved negligence in computing the totals in the corporation's books, a pure accounting error of the inadvertant type. The former involved rather a failure to disclose, not proven to be otherwise than innocent. This is very much akin to ordinary fraud, although an extreme example due to the supposed disinterest of a public accountant. The cases that will come later, will undoubtedly be of the "accounting error" type. The court in the State Street Trust Co. case suggested that it was entirely possible to base a cause of action by a third party on negligent accounting, alleging fraud, produced by "a refusal to see the obvious, a failure to investigate the doubtful."

WILFORD ARNOLD LeFORESTIER

TORT ACTIONS BETWEEN PARENT AND CHILD

Until the year of 1891 no case of an action by a minor child against its parent for tort appears in either the English Reports or any of the state reports. This, of itself, is, probably, the best proof of the fact that the Common Law viewed the family as a self-governing entity ruled and controlled by the father. Needless to say the woman does not enter a discussion of this phase of the Common Law because under that system she had no separate entity.

The appearance of such causes of action in the reports subsequent to 1891 is probably due to the enactment about that time, in most jurisdictions, of the Married Women's Acts. It then appears that the legal minds, reasoning from the apparent legislative intents and policies expressed in these Acts, concluded that such intent and policy might properly be extended to cover tort actions between parent and child.

But, time and again, the Courts in this and other jurisdiction have re-affirmed the Common Law Rule and stated that in the absence of positive Legislative mandate it must be affirmed. As indicated above, some suggestion of an anomaly appears at first glance in the proposition that a wife may now sue her husband for his tortious acts (§57 D.R.L.) and in the fact that a child is denied a remedy for the tortious acts of his father. This anomaly, however, become superficial and disappears when the nature of the two relationships is considered. The relationship of husband and wife is consensual and unnatural - unnatural in the sense that it is not caused by and, except for minor, indirect influences, is free from the operation of the natural law. Whereas, the relationship of parent and child is natural and has no legal status except as to the limited period of the minority of the child.

In the support of the contention that the courts will not permit a child to maintain an action of this nature, the case of Crosby v. Crosby, 230 A.D.651, is the most explanatory. In other cases the courts, apparently, considering the point so thoroughly and definitely decided, have affirmed its application without opinion. However, in one of the later cases holding that a parent may not recover damages occasioned by the tort of an unemancipated minor child, the affirmation was by a four-to-three holding. (Sorentino v. Sorentino, 248 N.Y. 626). Whether the court was divided upon the rule of law under discussion is not known, but it may be assumed, not too unreasonably, that such was the case in view of dicta in later cases indicating a judicial dissatisfaction with the present rule.

In Crosby v. Crosby, (supra) an action by a mother against her minor child predicated on the alleged negligence of the child, the court said: "Among the reasons for denying an unemancipated child the right to recover for a personal injury inflicted by the parent is the danger of disrupting the tranquillity of the family, the interference with parental discipline and control and the old Roman doctrine that the family in its entirety was a unit." The court went on citing from State v. Oliver, (70 N.C.60), "It is better to draw the curtain, shut out the public gaze and leave the parties to

forget and forgive." Though this rule has been strictly and invariably applied in tort actions it has never been felt by the judiciary that preservation of the family tranquillity and public policy should deny an infant the right to maintain a property action against the parent. The reason for such a rule, in relation to property actions, appears to be based upon the theory that the courts are the ultimate guardians and custodians of the property of minor children

In Le Galbo v. Le Galbo, 130 Misc. 485, the court in commenting upon the split decision of the Sorentino case (supra) stated "It would be easy to state situations where absolute adherence to this rule in negligence cases might result in a situation which would be little less than barbarous; it is possible out of consideration of such situations, and of the changed conditions arising out of the use of automobiles, the Court of Appeals gave such hesitant support to the Old Common Law rule." What was meant by the court in the use of the words "the changed conditions arising out of the use of automobiles" will follow later in the discussion. The courts have consistently felt that the child was sufficiently protected by the Penal law and have denied the child a civil remedy in cases of rape (Roller v. Roller, 79 Pac. 788), and assault (Smith v. Smith, 142 N. E. 128).

It has probably appeared obvious throughout this discussion that the rule is applied only in the case of an unemancipated minor child. But does emancipation of a child eliminate the question of public policy? It would hardly seem so, for the question of emancipation is often a very close issue usually implied rather than expressed, and in those cases where the emancipated minor remains within the family group, domestic tranquillity and thus the peace and harmony of society of which the family is the basic unit is as seriously endangered as in those cases in which the minor is unemancipated.

In support of the "tranquillity" reason for such a doctrine, others have been offered from time to time - facility of fraud, the theory that a recovery would be a drain on the family assets necessary for the support of it, and the reason that should the child recover from the parent and subsequently die then the parent would re-acquire the recovery had in the tort action. It will be seen at a glance that none of these secondary reasons has any real, independent merit, wherever may be their merit as supporting arguments.

Le Galbo v. LeGalbo (supra) plainly indicates dissatisfaction with the present rule especially in respect to its application to negligence actions arising out of automobile accidents. As to this phase of the topic the Court in the concluding paragraph, argues: "I do not feel that under present conditions, particularly in reference to automobile accidents, the question of public policy, which has been the basis of the common law rule in respect to this sort of actions, should longer be applied. It is a matter of common knowledge that a great proportion of owners of automobiles are protected against damages by insurance and that in such cases no question of public policy could possibly be involved (excepting

only in cases of fraud in the action itself) and resort to the old common law doctrine established in the aid of maintenance of family relationship would not, in automobile cases, be sound public policy, and might and usually would result in the defeat of the very purpose for which the rule was at common law maintained. Were the matter before me de novo I would be in favor of the abrogation of the rule in its entirety." Unfortunately, in this case the question was not squarely before the court since the pleadings raised the issue of emancipation and the sole question to be determined was the sufficiency of the complaint. Had the question been there, would the court have been constrained by the doctrine of stare decisis? And if not, what fate would a decision abrogating this long-standing rule meet in the higher courts?

The Sorrentino case (supra) appears to be the last expression of the Court of Appeals on the precise point. But, recently, both the Appellate Division and the Court of Appeals were called upon to decide whether the public policy rule would ban an action by a brother against his sister where both were minors living with and supported by their parents. The action (Rozell v. Rozell, 256 A.D. 61, 281 N.Y.106) was predicated upon the negligence of the sister in the operation of an automobile. In holding the action was maintainable both courts intimated that perhaps the necessity for the rule under discussion was no longer necessary. "Family has been for centuries the fundamental unit of society. The modern family, however, is far different in structure, status and internal, social and legal relationship than the family of ancient times. Rigorous restrictions ***** in the relations of its members with one another have gradually moderated and, in some respects, have totally disappeared until our common law and constitutional and statutory sanctions affecting family relations are more in harmony with the common sense of modern life." Again, "An infant may now sue his grandmother in tort (264 N.Y. 589) and the sons and daughters in the family and no longer subject to patria potestas." This by the Court of Appeals in Rozell v. Rozell (supra). The argument used by the Appellate Division in the same case to permit that action to be maintained is equally applicable to a tort action between parent and child. "Surely, if the Legislature was convinced, as it must have been, that husband and wife might seek redress in the courts against each other for torts without involving them in perpetual controversy and litigation and without sowing the seeds of discontent and discord in the home we fail to see how such consequences may be anticipated to result from permitting brother and sister (Cound not the words parent and child be interposed for brother and sister without destroying the force of the argument?) to hold each other answerable for a negligent or wrongful act." (Rozell v. Rozell 256 A.D. 61).

In Drobner v. Peters, 232 N.Y. 220, the Court of Appeals stated "The modern tendency of decided cases is to ignore fictions and deal with things as they are." The proposition that a child should be permitted to bring an action against its parent, at least one involving negligence in the operation of an automobile, can no longer be defeated by the argument that it is contrary to public policy. Perhaps, the child should not be permitted to bring other tort actions, as a civil assault action, for the prosecution of such action might well be a "menace to family discipline and calculated

to destroy the family unit." There, too, protection is afforded by the Penal Law. A few jurisdictions have already abandoned the rule. In Scotland it was destroyed in 1934 S. C. 499; and in New Hampshire in 1930, in the case of Dunlap v. Dunlap, 150 Atl. 905. There the court stated, "A child cannot be denied the right to sue the parent for tort because of the effect on discipline and family life."

Will the New York courts follow this trend? It may be that the rule is so firmly entrenched that our courts will feel constrained by it. In that case the rule may remain a part of our law, unless the Legislature sees fit to change it by a statutory enactment.

EUGENE PETER DEVINE

N O T E S

TRIAL BY JURY AS THE CONSTITUTION PROVIDES.- Among the recent statutes of the Legislature that have been called to my attention, Chapter 420 of the Laws of 1939 presents a feature that if for nothing more than its brevity, merits discussion. This enactment is an amendment to the Vehicle and Traffic Law §2 Subd.29. Formerly the law read:

> "A 'traffic infraction' is the violation of any provision of this chapter, or of any local law or ordinance governing or regulating traffic, where a penalty or other punishment is prescribed and which is not expressly declared by this chapter to be a misdemeanor or a felony. A traffic infraction is not a crime, and the penalty or punishment imposed therefor shall not be deemed for any purpose a penal or criminal penalty or punishment, and shall not affect or impair the credibility as a witness, or otherwise, of any person convicted thereof. The definition herein prescribed shall be retroactive and shall apply to all acts and violations heretofore committed, where such acts and violations would, if committed subsequent to the taking effect of this subdivision be included within the meaning of the term 'traffic infraction' as herein defined. Courts and judicial officers heretofore exercising jurisdiction over such acts and violations as misdemeanors or otherwise shall continue to exercise jurisdiction over traffic infractions as herein defined and for such purpose such acts and violations shall be deemed misdemeanors and all provisions of law relating to misdemeanors, except as herein otherwise expressly provided, shall apply to traffic infractions." (Vehicle & Traffic Law, supra.)

As amended, the last sentence is continued: "except however, that no jury trial shall be allowed for traffic infractions. (Chapter 420, Laws of 1939).

It is the amendment that provokes controversy. Upon first sight there seems to be grounds for a discussion as to the violation by the statute of Article I §2 of the New York State Constitution, which reads: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever...." But to settle any academic discussion of the problem, the attention of the reader is called to Article VI §18 of the New York State Constitution which reads in part: ".....Courts of Special Sessions and inferior local courts of similar character shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law, and the Legislature may authorize them to try such offenses without a jury.. ...." This definitely and satisfactorily checks any misapprehension as to the constitutional question involved.

W. Le F.

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